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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition Act )  
 )  
Rate Regulation )

MM Docket 92-266

PETITION FOR RECONSIDERATION

July 12, 1993

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### PETITION FOR RECONSIDERATION

#### I. Summary

Counsel for the Municipal Franchising Authorities (MFA), submit this petition to the Federal Communications Commission (FCC or Commission) for reconsideration of its decision to postpone the effective date for refunds of unreasonable basic service tier rates until October 1, 1993. Deferral of the refund effective date is inconsistent with Congressional mandate, as well as Congressional intent, in enacting the Cable Television Consumer Protection and Competition Act (Act or Cable Act). The Commission should reinstate June 21, 1993 as the effective date for cable rate refunds. The Commission should also consider extending the cable rate freeze until November 15, 1993 in order to permit the MFAs to complete the process of becoming fully effective regulators prior to the expiration of the freeze.

## II. Introduction

Pursuant to 47 U.S.C. § 405 (1991) and Rule 1.429 of the Federal Communications Commission's (FCC or Commission) rules of administrative procedure,<sup>1/</sup> Duncan, Weinberg, Miller & Pembroke, P.C., as counsel for the Municipal Franchising Authorities, petitions the Commission to reconsider, in part, its Order, FCC 93-304,<sup>2/</sup> issued in connection with implementation of the Cable Act of 1992. This Order, released on June 15, 1993, defers the effective date of the Commission's previously issued Rate Order from June 21, 1993 to October 1, 1993, and extends the rate freeze ordered by the FCC from its initial termination date to November 15, 1993.<sup>3/</sup>

The Rate Order directed franchising authorities to determine whether the cable operators in their jurisdictions are charging unreasonable rates for the basic service tier.<sup>4/</sup> If an operator's basic service tier rate is deemed unreasonable, the franchising authority can order the

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<sup>1/</sup> 47 C.F.R. § 1.429 (1992).

<sup>2/</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act, Rate Regulation, Order, ("Deferral Order") MM Docket 92-266, FCC 93-304 (released June 15, 1993).

<sup>3/</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking ("Rate Order"), MM Docket 92-266, FCC 93-177 (released May 3, 1993).

<sup>4/</sup> Rate Order at ¶ 118-119.

operator to provide a refund to its subscribers.<sup>5/</sup> The refund would extend from the date ordered by the franchising authority back to the effective date of the Rate Order, but, in any event, not more than one year.<sup>6/</sup> The FCC's Deferral Order expressly postpones the refund effective date for these refunds until October 1, 1993 in order to correspond with the deferral of the effective date of the Rate Order.<sup>7/</sup>

Counsel for the MFAs submit this petition to the Commission for reconsideration of its decision to move the refund effective date to October 1, 1993. A petition for reconsideration may be filed by any party aggrieved by an action of the Commission, or whose interests have otherwise been adversely affected.<sup>8/</sup> The MFAs represent the interests of their constituent cable subscribers. The MFAs' subscribers have clearly been aggrieved by the FCC's Deferral Order.

By changing the refund effective date to conform to its Deferral Order, the Commission has caused grave injury to the interests of cable subscribers throughout the country. The FCC's actions preclude cable subscribers from receiving refunds for the unreasonable basic tier rates they will be compelled to pay from June 21, 1993 to October 1, 1993. The Deferral Order, in effect, postpones for three months the

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<sup>5/</sup> Rate Order at ¶ 141.

<sup>6/</sup> Rate Order at ¶ 142.

<sup>7/</sup> Deferral Order at ¶ 4 n.9.

<sup>8/</sup> 47 U.S.C. § 405 (1991).

remedy to which cable subscribers are entitled under the Act.

The Commission should grant this petition for reconsideration of that portion of the Deferral Order which postpones the refund date for unreasonable basic service tier rates. As recently noted by Congress itself, the Commission's actions are inconsistent with its express obligations under the Act. Deferral of the refund effective ~~date is contrary to the statutory intent of the Act—the~~

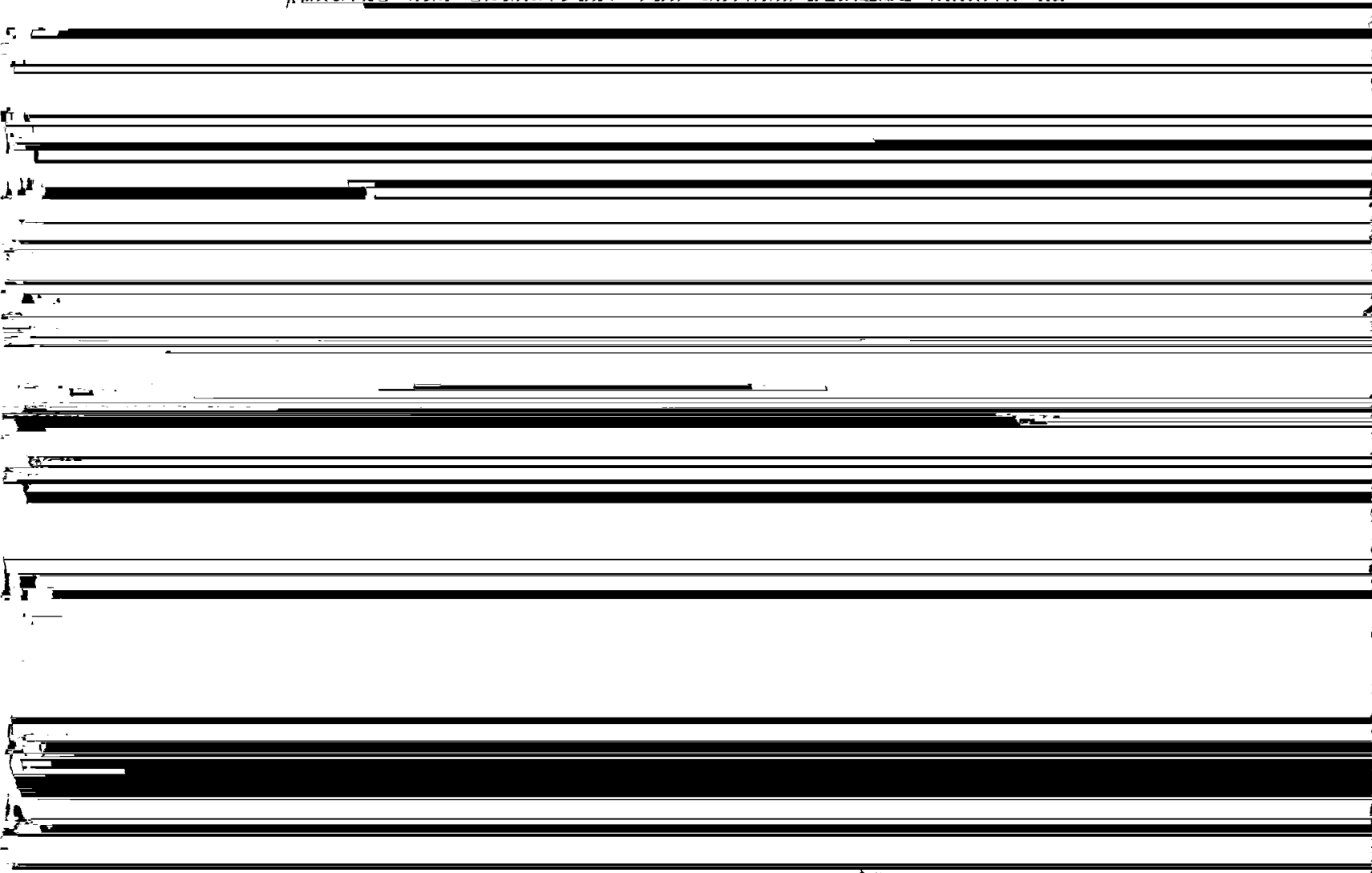


its obligations"<sup>11/</sup> (emphasis added). The Commission is under the same mandate and timeframe to establish regulations which will identify unreasonable cable programming service rates.<sup>12/</sup>

The Act uses the word, "shall," both to impose an obligation on the Commission and to direct the Commission as to how that obligation is to be fulfilled. "Use of the word 'shall' indicates mandatory intent," on the part of Congress<sup>13/</sup> (emphasis added). The Act indicates that the FCC shall prescribe regulations to fulfill its obligation within 180 days of enactment of the Act. Part of this obligation is to ensure that basic tier rates are reasonable. However, by deferring the refund effective date, the FCC is requiring that some subscribers must continue to pay unreasonable basic service tier rates until October, 1993. The Act was passed in October of 1992. Hence, under the Deferral Order

underlying policy."<sup>14/</sup> The Congressional mandate in the Act is explicit. The Act refers to this mandate as the Commission's "Obligation". Furthermore, in the Conference Report accompanying the Commission's 1993 supplemental appropriation, Congress directs the FCC to implement the Act immediately.<sup>15/</sup> The Report states, "the Conferees intend that the Commission shall establish a date as soon as possible after enactment of this Act, but . . . no later than September 1, 1993, as the date from which consumers may obtain refunds" for unreasonable rates.<sup>16/</sup> This conference report is evidence of a Congressional intent to effectuate the original mandate of the Cable Act.

We applaud Congress' dedication to the consumers of America and agree that the refund program should be



At the same time, in recognition of the implementation concerns that the Commission identified in its June 15 Order, we would support retaining October 1, 1993 as the earliest date a municipality may seek certification of regulatory authority from the Commission. In this way, the interests of the consumer will be fully protected through refunds, and the implementation concerns of the FCC will be accommodated. Moreover, the objections expressed in Congress over the deferral of the refund date will be adequately addressed.

**B. Deferral of the Refund Effective Date is Inconsistent With the Statutory Intent of the Act**

When interpreting a statute, it is necessary to look to the policy behind the act, in addition to its plain language.<sup>18/</sup> The Cable Act's Statement of Policy provides that the protection of consumer interests is one of the policies of the Act.<sup>19/</sup> By subjecting cable subscribers to unreasonable basic service tier rates for an additional three months, the Commission has fallen far short of the Congressional policy behind the Act. Rather than protect consumer interests, the FCC's actions have imposed additional injury upon consumers. This is clearly contrary to the Act's stated policy.

Compliance with the stated policy of the Act is not discretionary. "If Congressional intent is clear, 'the

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<sup>18/</sup> Crandon v. United States, 494 U.S. 152, 158, (1990); In re Graven, 936 F.2d 378, 385 (8th Cir. 1991).

<sup>19/</sup> Pub. L. No. 102-385, 106 Stat. 1460, Sec. 1(b).

court as well as an agency, must give effect to the unambiguously expressed intent of Congress.'"<sup>20/</sup> Consumer protection is the stated policy behind the Act. Maintaining the refund effective date serves this purpose; deferring this date is contrary to the purpose. Thus, in order to give effect to the purpose of the Act, the Commission must maintain the original June 21 refund effective date.

The legislative history of the Act also indicates that Congress intended that the FCC assist in furthering this goal of consumer protection. The Conference Report for the Act specifies that the goal of the FCC basic service tier regulations is to protect subscribers.<sup>21/</sup> Furthermore, it is clear from the remarks of individual legislators that Congress intended the Act to provide immediate assistance to

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<sup>20/</sup> Animal Legal Defense Fund v. Madigan, 781 F.Supp. 797, 800 (D.D.C. 1992) (quoting Chevron v. N.R.D.C., 467 U.S. 837, 842-43 (1984)).

<sup>21/</sup> H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 62 (1992). See also S. Rep. No. 92, 102d Cong., 2d Sess. 1 (1992) ("Purpose [of Act]... is to provide protection for consumers against monopoly rates"); id. at 7 ("Subscribers are being gouged by cable operators"); id. at 19 ("Under the legislation, the FCC shall establish rules to ensure that these [basic tier] rates are reasonable."); H.R. Rep. No. 628, 102d Cong., 2d Sess. 30 (1992) ("The legislation will protect consumers from unreasonable behavior by the renegades in the cable industry."); id. at 79 (Section intended to "ensure that consumers have the opportunity to purchase basic services at reasonable rates."); id. at 86 ("In order to protect consumers it is necessary for Congress to establish a means for the FCC ... to identify unreasonable rates and to protect them ...").

the public.<sup>22/</sup> Congress envisioned the FCC as a proponent of the Act's consumer protection goals. However, by deferring

**C. Deferral of the Refund Effective Date is Inconsistent with the Content and Purpose of the Rate Order**

The Commission's Rate Order acknowledges that consumer protection is a priority of the Act.<sup>25/</sup> In the Order, the Commission also states that its independent surveys confirm Congress' concerns that current cable rates do not reflect a competitive market.<sup>26/</sup> In response to this problem, the Order provides, the Commission must devise an "expeditious way to trigger initial review of a cable operator's current rates for the basic tier."<sup>27/</sup>

By deferring the refund effective date, the Commission appears to have deviated from the self-proclaimed expediency of its mission. The Rate Order justified the Commission's authority to order refunds for the basic service tier, on the grounds that the refunds "effectuate the statutory directive" of the Act.<sup>28/</sup> If the intent of the regulations promulgated by the Rate Order was to effectuate the Act's statutory mandate, the Commission should not now contradict its actions by decelerating the refund process and reducing the scope of this remedy.

Finally, it should be pointed out that maintaining the June 21, 1993, refund effective date would not present a "lack of notice" problem for cable operators. The May 3,

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<sup>25/</sup> Rate Order at ¶ 8.

<sup>26/</sup> Rate Order at ¶ 14.

<sup>27/</sup> Rate Order at ¶ 116.


<sup>28/</sup> Rate Order at ¶ 141.

1993, Rate Order clearly provides the means for cable operators to determine if they will be subject to the refund requirements under the benchmark rate. Thus, even if the actual implementation of the Rate Order is deferred until October 1, 1993, the operators will have been on notice since May 3, 1993 that they could be ordered to provide subscriber refunds.

**IV. The Commission Should Extend the Expiration of the Cable Service Rate Freeze**

Concurrent with the Rate Order, the FCC issued a Rate Freeze Order.<sup>29/</sup> The Order froze cable service rates because, the Commission was "concerned that during the time between adoption of the rules and the date the franchising authority can establish regulation . . . cable operators could raise rates," thus "undermining the statutory purpose of the reasonable rates."<sup>30/</sup>

The Commission's Deferral Order did extend the rate freeze until November 15, 1993.<sup>31/</sup> However, counsel for the



effective date of its rate regulations, in part, because of the magnitude of the necessary preparation efforts.<sup>32/</sup> The franchising authorities likewise could benefit from

additional preparation time. By extending the rate freeze



Commission's own Rate Order. In addition, the MFAs suggest that it would be helpful to the franchising authorities if the Commission extended the rate freeze an additional 60-90 days.

Dated July 12, 1993

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Janice L. Lower", is written over a horizontal line.

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